STATE OF MICHIGAN
IN THE SUPREME COURT

(On Application for Leave to Appeal from the Court of Appeals, Bandstra, P.J., Fitzgerald and Sawyer, J.J.)

KENNETH R. DEYO,
Plaintiff-Appellant,

-vs-

VICKI E. DEYO,
Defendant-Appellee,

Supreme Court No.:
Court of Appeals No.: 245210
Lower Court No.: 01-30982-DM

Opn 5/25/04
Rec 7/1/04

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PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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ORAL ARGUMENT REQUESTED

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Dated: August 11, 2004

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STATEMENT OF JURISDICTION

Plaintiff-Appellant, on November 26, 2002, timely claimed his appeal from the Livingston County Circuit Court's Judgment of Divorce of November 19, 2002. The Judgment of Divorce was the first judgment that disposed of all the claims and liabilities of all the parties, and, thus, was a final order under MCR 7.202(7)(a)(1). Accordingly, the Court of Appeals had jurisdiction to hear this appeal under MCR 7.203(A)(1).

The Court of Appeals issued its decision on May 25, 2004. Plaintiff-Appellant timely moved for reconsideration on June 6, 2004. The Court of Appeals denied reconsideration on July 1, 2004. Plaintiff-Appellant is filing this application within 42 days of that decision and, thus, this Court has jurisdiction to hear this matter under MCR 7.301(A)(2) and MCR 7.302(C)(2).

ISSUE PRESENTED

Issue

DID THE TRIAL COURT ERR IN AWARDING 100% OF THE MARITAL PROPERTY, AND, BEYOND THAT, HALF OF THE PLAINTIFF'S INHERITED FAMILY FARM, TO DEFENDANT-APPELLEE, MAKING HER AN UNDIVIDED TENANT IN COMMON ON SAID FARM, AND ALSO AWARDING HER $200.00 PER WEEK IN UNENDING ALIMONY, ALL ON THE BASIS OF ITS DETERMINATION THAT DEFENDANT BORE FAULT IN THE FAILURE OF THE MARRIAGE?

The trial court answered this question: No.
The Court of Appeals answered this question: No.
Defendant-Appellee would answer this question: No.
Plaintiff-Appellant answers this question: Yes.

INTRODUCTION

Grave-diggers and gold-diggers. One kind spends their whole life toiling, being reminded daily that whatever does not kill them only postpones the inevitable. The other lives with an eye only to the future, counting on one day hitting the mother-lode, cashing in, and counting her riches. This case has one of each, and, one might say, each got what they must have expected, given their occupations. The predictable ending, however, is often not the fair one. In movies, this is called irony, but in our courts, it must be called error.

* * *

This is a "DM" or divorce with minor children case, in name only. The parties had two children, one of whom was 21 at the time of trial, the other of whom was 17, and by now has long since reached the age of majority. Things should then be simpler, as, while cases with children (at least those that reach this Court), almost invariably involve extreme emotions and facts which will guarantee their pendency before the circuit court for years to come, DO cases should at least lack the latter of these. This case, to be sure, had too much emotion, but then, inexplicitly, was given literally a lifetime duration by a trial judge who severed the bonds of matrimony only to then replace them with a judgment making the parties tenants in common in Plaintiff-Appellant's family farm, which until that moment was his separate, inherited, property. MCL 552.23 and MCL 552.401 offer limited reasons for the invasion of a spouse's separate property. Essentially admitting it was ignoring those mandates, the trial court gave the Defendant-Appellee the *entire* marital estate (easily over $700,000.00 worth), and then gave her more, simply because, as its opinion all too obviously indicated, it allowed itself to borrow some of the emotions Defendant felt toward the Plaintiff.

* * *

This is not a typical multi-million dollar case. Plaintiff was a gravedigger by trade, while Defendant stayed at home and raised the children. The value in this case is in land, not cash or negotiable instruments, meaning none of these parties are, or ever have, lived the life-style associated with most seven figure divorce cases. Indeed, neither could, before or after this case, without selling the lands they were either living on or making ends meet from. The dollar figures here, while real enough, are less concrete then most, and dividing such property is not as simple as the exchange of signatures and checks usually seen when the parties' wealth exists in some broker's accounts.

The trial court got this wrong three times: it invaded separate property not for need or assistance in accumulation, but because it was infuriated at the fault if found to rest with Plaintiff. While this was and is a disputed issue, the trial court certainly is entitled to its assessment. Even so, both its words and actions were too strong, on this, and, for that matter, most any record. Having decided that it would invade Plaintiff's separate inheritance, it then cursed him with a tenancy in common with his ex-wife on his family farm, when any reader of this record, whomever they sided with, would certainly agree these parties should have not a single thing more to do with one another. Finally, it tacked on unending weekly alimony of $200.00 per week, even though the two of the other properties Defendant received, and the farm property itself, were and are income producing.

The Court of Appeals majority elected to simply reproduce portions of the trial court's opinion, even in the face of a strong dissent that pointed out the legal fallacy of its underlying presumptions. Even worse, despite being asked both initially and very specifically on

reconsideration, the Court of Appeals did not address the primary issue in this case, which by its own holdings exists only in error, the trial court's refusal to actually divide the property in this case and separate the parties' interests.

Plaintiff may have gotten a divorce, but he will both share ownership of his family farm with his ex-wife and pay weekly alimony for the rest of the parties' lives. Defendant got a divorce, *all* of the marital property, four lifetime incomes (two from rental properties awarded her, one from the farm, and one from alimony) and the chance, as a joint owner, to raise an objection, every time Plaintiff so much as goes hunting on his farm. Whether because it was being really bright (if not devious), or really dense, the trial court gave Plaintiff a sentence, not a judgment, leaving him no choice but to appeal, and hope this Court can restore some distance between the emotions in this case and its decision.

STATEMENT OF FACTS AND PROCEEDINGS[1]

Factual History

Background

The trial court's view of the basic jurisdictional facts is not disputed and offers an basic introduction:

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[1] The record in this case will fill a box. Likely to be cited little if at all are the initial transcripts of the Motion to Set Aside Interim Support Order, heard by Referee Kathleen Oemke on May 31, 2001 (Interim TR), the Show Cause for Failure to Comply with Status Quo Order, heard by the referee on September 27, 2001 (Show TR), and the Status Conference before Judge Stanley J. Latreille, who also presided over the trial, on March 28, 2002 (Status TR). The trial lasted five (not always whole) days, August 27, 2002 (TR I), August 28, 2002 (TR II), September 3, 2002 (TR III), September 4, 2002 (TR IV), and September 5, 2002 (TR V). The trial court's Opinion and Order was issued in writing, and is Attached Exhibit 1. Entry of the judgment required another hearing, on November 1, 2002 (Judgment TR), at which the trial court settled some drafting issues and explained parts of its opinion. The judgment itself is Attached Exhibit 2.

Plaintiff is 47 years old and defendant wife is 44. They were legally married on July 27, 1977. Two children were born of the marriage, Jeanette, now 21, and Christine, 17. It is clear that the marriage has broken down to the extend that the objects of matrimony can no longer be attained. There is no hope of a reconciliation.

Throughout the marriage, the defendant was a stay at home mother, while the husband was employed by Holy Sepulchre Cemetery. The parties lived an extremely frugal life. Early in the marriage, the defendant inherited $100,000, which she utilized as needed for the maintenance of the family. In addition, the parties were able to save a fair amount of money despite the husband's limited income.

In 1997, the plaintiff inherited an estate that he testified is today worth $2,339,133.71, consisting mainly of real estate and stocks. Opinion and Order [Attached Exhibit 1], p 1-2.

The Plaintiff[2]

From the beginning of the marriage until he had to leave work to care for his ill father,

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[2] While the transcripts are often called a dry record, such is not the case here on several instances, many of which concern the Plaintiff-Appellant, undersigned counsel's client. Having spoken with him on several occasions, undersigned counsel is not the least bit surprised that he made a lousy witness. He is a simple man, the kind who is prone to dismiss the intricacies of the law as so much technicality and mumbo-jumbo. When confronted with Defendant-Appellee's able counsel (Edwin Literski, P34794, whose partner now appears on appeal), who not accidentally insisted on bouncing all over the place in cross-examination (as he freely admitted time and again, *e.g.,* TR II, 76), he did more or less just that, often enough to draw the ire of the trial court which went so far as to mention (without citing) CJI2d 3.6(3)(c), which deals with witnesses arguing with lawyers. TR II, 99. All of that was appropriate enough, though the trial court's next comment, reflecting the "bad impression" it had of Plaintiff-Appellant, might well not have been. *Id.* This comment, unfortunately, only began the trial court's efforts at letting Plaintiff know just what it thought of him.

Plaintiff[3] worked as a grave-digger and landscaper for the Archdiocese fo Detroit. TR I, 70-71. Not surprisingly, he hated the job. TR II, 44. He left on March 20, 1996. TR I, 71. The Church did not pay that well, approximately $25,000 per year, but there was a retirement package. *Id.* Apparently due to when he left employment, he cannot draw on the pension, which would pay just over $500.00 per month, until he reaches age 70. TR I, 70-71.[4] Plaintiff and Defendant separated around the time he filed for divorce in March 2001. TR I, 69.

Orville Quinney

Orville Quinney was Plaintiff's father. TR I, 21.[5] He died in November 1997, which would have been just over a year and a half after Plaintiff quit his job to care for him. TR I, 22. He died a wealthy man, leaving, according to his accountant, an estate with $1,460,000 in real estate, $2,073,000 in stocks and bonds, $16,000 in cash, $79,000 in property, and the Internal Revenue Service no doubt salivating at the $1,292,831.00 of this due in estate taxes, which Plaintiff, the only heir, paid by both liquidating and leveraging various financial instruments. TR I, 28-30. No one doubted that Mr. Quinney was a man who could be difficult to get along with,

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[3] Plaintiff-Appellant was represented below first by Annette R. Aisner, P41427, and, by the time of trial, by local counsel Carol Baringer, P44510.

[4] The usual conflict in appellate brief-writing appears, but it is more pronounced here than usual. MCR 7.212(C)(6), applicable here via MCR 7.302(A)(1), demands all material facts be included, and, thus, a pension probably cannot be ignored. On the other hand, given the result, it might as well not exist. The pension would not even cover the $200.00 *per week* in spousal support Defendant has been awarded, Judgment, p 4, and, in any event, Defendant gets half of the pension too. Judgment, p 9. While his circumstances have changed, in that he now has some income-producing property, it is not that far off to say that, after this judgment, Plaintiff's pension, the result of some 20 years in what must be one of the most depressing jobs imaginable, is simply a mirage whose waters he will never taste.

[5] Plaintiff's father and mother never married, which accounts for the difference in names. Opinion and Order, p 5.

especially toward women, and that his relationship with Defendant was often poor, though the extent of the relationship itself was contested. TR IV, 12; Opinion and Order, p 5.

The Defendant

At the time of trial, Defendant lived in the home at 3814 Steinacker, along with the 17 year old daughter, Christine, and an unrelated seventeen year old male described as Christine's friend. TR III, 139-140.[6] At the beginning of the marriage, Defendant worked at a Michigan National Bank as an assistant head teller. TR III, 142. That lasted about a year and a half. TR III, 142. She stated she quit to start a family, and recalled getting pregnant about two months after she left her job. TR III, 142. She did not think an investigation into thefts at the bank had anything to do with her departing from that job before getting pregnant. TR III, 144. Her employment after this consisted of being a lunchroom and playground aide, which might have amounted to $500-$1,000 per year. TR I, 143. As she freely admitted to her own attorney, she spent the early years of the marriage looking forward to the time they would inherit from Plaintiff's father. TR IV, 64. While she had a litany of physical complaints similar to those anyone in their fourth (and, for some, their third) decade could likely come up with, she admitted being physically able to work. TR III, 144-146.

Earnest Chandler, the Appraiser

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[6] Defendant denied that Christine and this young man were boyfriend/girlfriend, though any reader with teenage children certainly heard alarm bells before getting to this note. TR III, 141. Other than an explanation as to his mother having moved to Linden and the boy having transportation difficulties, Defendant did not really offer anything concrete as to exactly why he happened to live with Christine and her. TR III, 140-141.

Earnest E. Chandler, Jr., was called as the appraiser. TR I, 110-111.[7] Everyone stipulated as to his expertise. TR I, 112. His appraisals, which the trial court correctly found to be undisputed (Opinion and Order, p 5), will be used as to the farm properties. The remaining properties had stipulated values. Opinion and Order, p 5.

The Properties

With trial transcripts of 816 pages, simplicity is likely too much to expect, even as to something as routine as the marital home, which changed a couple of years prior to the filing of divorce (with the parties keeping the old one as a rental). The parties took to referring to the various properties by their location, and, as to the Steinacker properties (there are two, next door to one another), by their addresses, a practice that will be repeated here.

Eleven Mile Road[8]

Plaintiff inherited from his father a farm on Eleven Mile Road in South Lyon.[9] TR I, 89. Growing up, he had farmed it along with his father.[10] TR I, 89. After Mr. Quinney's death, it took all of about a week for Defendant to begin asking that Plaintiff put her name on the deeds

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[7] Keenly observant readers of the transcript may wonder as to the trial judge's remark about Mr. Chandler's "running a movie house." TR I, 110. Several years ago, the Chandler Corporation stepped in and saved the Howell Theater (located right across from the old Howell courthouse) from becoming office space and a parking lot for a newspaper.

[8] The address is 51475 Eleven Mile, South Lyon. TR I, 74.

[9] The property is apparently actually in Lyon Township, but has a South Lyon mailing address. TR I, 74.

[10] His father had originally purchased the property in the 1950s. TR I, 74. While Defendant assailed even this, Plaintiff's memories of his life on the farm are good ones. TR I, 56.

for various properties. TR I, 88-89.[11] He did not do so as to any but the 3814 Steinacker home. TR I, 88-89.

The Eleven Mile Road property is a 48.8 acre parcel with a small rental house[12] and a functioning oil well situated on it. TR I, 113. Mr. Chandler valued it at $798,400.00, which included his valuation as to the oil and gas rights. TR I, 113. The property has two leases on it, one for the oil well and another for the remainder of the acreage, which is used as a tree nursery/farm. TR I, 116. Mr. Chandler could not estimate how much might have been wetlands, and did not test for perk, but did note that the property had no drainage, water, or sewer. TR I, 116-117. When asked by Defendant if the property could be sold for development, Mr. Chandler testified that he believed anyone doing so would lose $198,000 in the process. TR I, 123.[13]

Old Plank Road

The property located at 3330 Old Plank Road is another family farm, located in Milford Township. TR I, 90, 117-118. Plaintiff farmed this as well, along with his father, during his youth. TR I, 90. Mr. Chandler put its value at $867,500. TR I, 118. This property has two

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[11] Which means, of course, she waited until the body was buried, but got to this question before the headstone would even have been carved.

[12] The rent for this house is $1,000 per month, which was going to the Plaintiff prior to trial. TR I, 101. Now, apparently, that will be split between the parties. Judgment TR, 17.

[13] While Solomon was wise enough to only threaten, this property is the baby the trial court split, making the parties tenants in common. THE COURT: "It's my intention that they each own undivided one-half." Judgment TR, 17. In other words, the marriage is destroyed, the and parties are irreconcilable, but they are also stuck with each other until Plaintiff either agrees to sell the family farm or drops dead. This particular trial judge has done quite well penning a legal thriller, and, it seems, might have some talent at crafting country music lyrics as well.

residential structures on it, both being used as rentals.[14] TR I, 119-120. Like the Eleven Mile Road property, this one lacks water and sewer, with perk being an unknown. TR I, 120. In response to Defendant's question, Mr. Chandler thought that trying to develop this property would be a losing proposition, to the tune of minus $170,000.[15] TR I, 123.[16]

Johns Road[17]

The parties bought this house as the marital home in 1986. TR I, 82.[18] It was originally bought on land contract for $42,000, though the deal got more complicated than that. TR I, 82-83. Through a tortured rationale that undersigned counsel could not possibly do justice to (or, for that matter, figure out from the record enough to even make sense of), Defendant thought that most of this was her money. TR III, 153-158. In any event, the parties lived here until moving to 3214 Steinacker. This home was close to the Eleven Mile property, where Mr. Quinney lived

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[14] One rented at $1,000 per month, the other at $650 per month. TR I, 101. These rentals, prior to the trial, were going to Plaintiff.

[15] While some testimony about a supposed past offer for one of these properties floated around the fringes of this case (TR I, 55-56), no real estate professional, or, for that matter, anyone else, testified as to any future plan or development that would prove Mr. Chandler, himself a licensed appraiser, broker and builder (TR I, 111), wrong as to his assessment that development was not a viable option for these particular properties, one of which, of course, has an active oil well sitting in the middle of it, TR I, 116, which, like all oil wells, emits odors and noises that most people living north of Oklahoma do not find soothing. TR I, 53-54.

[16] Plaintiff was awarded this property. Opinion and Order, p 8. Those words will not be seen again for quite a while.

[17] This property also probably sits in Lyon Township, as none of Johns Road falls within the South Lyon city limits.

[18] Prior to this, the parties lived in a mobile home. TR III, 153-154.

when he was in Michigan.[19] TR I, 75, 83. Everyone stipulated this property was worth $150,000. TR I, 99.[20] It was, at the time of trial, used as a rental. TR I, 100.[21]

3814 Steinacker

As Mr. Quinney's condition deteriorated and his dementia increased, he became the subject of an Oakland County guardianship case, with a GAL being appointed by Judge Moore (TR I, 83), and Plaintiff becoming his conservator and guardian.[22] TR I, 77. As the requirements for the care of Mr. Quinney increased, and Plaintiff's luck with hired caregivers continued to worsen, he found himself caring for Mr. Quinney full time. TR I, 80. This caused substantial problems at home. TR I, 81. Plaintiff wanted to bring his family and his father together, and, rather simplistically, figured that his wife could not through his father out of a house his father owned. TR I, 84. Accordingly (and also due to the fact that the Johns Road home had space constraints), with the GAL's approval, he used his father's funds, both cash equivalents and by leveraging, to purchase the 3814 Steinacker home, which became the new martial residence. TR I, 83-84.

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[19] The trial court commented repeatedly on the parties frugality. *E.g.,* Opinion and Order, p 2. While no one gave his age, it is reasonable to expect that Mr. Quinney would have had a good recall of the Depression, which, along with the World Wars, was one of the formative events in many lives in his generation. He apparently shared this frugal nature, which he no doubt passed to his son, but also took it a good bit farther, and probably a ways out of bounds, when he established a Las Vegas residence to avoid paying Michigan income taxes. TR IV, 10.

[20] While her rationale for why it started with out with her money was not accepted by the trial court, Defendant got this property anyway. Opinion and Order, p 8.

[21] The rent was $1,200 per month. During the pendency of this case (as well as now after), that went to the Defendant wife too. TR I, 100.

[22] The appointment occurred in December 1993. TR IV, 9.

Everyone moved to the 3814 residence, but, of course, as anyone could imagine even without checking the caption here, this was not a plan destined for marital bliss. TR I, 85. Defendant had little use for her father in law in any condition, apparently, and certainly not in this one. TR I, 85-86. It was a problem of short duration, however, as Mr. Quinney passed away after only two months in the new home. TR I, 85.[23]

After about a year and a half, Plaintiff gave into the badgering that began around the time most people send out thank you cards for the funeral arrangements and put Defendant's name on the deed for the 3814 home. TR I, 87-88.[24]

Plaintiff was out of this house with the filing of the divorce (TR I, 70), which was occupied by Defendant and the parties seventeen year old daughter, Christine, along with her 17 year old male "friend." TR III, 139-140.[25]

3802 Steinacker

This house, conveniently located next to the 3814 residence, was purchased by Plaintiff

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[23] Plaintiff testified that he originally thought that the 3814 residence would be sold after his father passed, but this never occurred. TR I, 85.

[24] Like most things in similar situations, waiting until the body cooled and the flowers died would not have changed anything. While the property certainly came from his father's money, the parties lived in it together as a martial home for quite a while, and Plaintiff's lawyers have never argued that this was not at least commingled. Accordingly, Plaintiff would have expected that Defendant would receive half of the appreciation of this asset under *McNamara v Horner,* 249 Mich App 177; 642 NW2d 385 (2002), and quite possibly more, though, in fact, she got the whole appreciation, principal, and house, and that was just the start of this judgment.

[25] Defendant has this house now (Opinion and Order, p 8), and the fact that Plaintiff has far worse things to complain of suggests just how lopsided this judgment is.

after Mr. Quinney's death as a rental.[26] TR I, 99. If has a stipulated value of $130,000. TR I, 98.[27]

Macomb County Rentals

There are three Macomb County rental properties, Chesterfield Street in Warren, Mona Avenue in Warren, and Martin Street in Roseville. TR I, 96. Each has a stipulated value of $75,000. *Id.*[28]

Who Cared?

Plaintiff quit his job on March 20, 1996, to care for his father. TR I, 71. Initially, he tried hiring a series of increasingly less successful caregivers[29], but eventually took on the duties himself. TR I, 77. Plaintiff recalls Defendant's contribution being little more than increasing the demands of the caregivers by yelling at them. TR I, 80. Defendant, of course, stated otherwise, and described a three year period of taking Mr. Quinney meals and such. TR IV, 6. She put this as between 1994 and the time caregivers were first hired. TR IV, 7. Eventually, and though the cross-examination is not painless reading, it turned out that this supposed three years included periods when Mr. Quinney was well enough to both drive himself around and take jaunts to Las

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[26] The rent was $1,000 per month, which, under a "status quo" order that was anything but, the Defendant wife received throughout the pendency of this action. TR I, 99.

[27] For those trying to keep score as they go, Defendant got this too.

[28] Plaintiff was awarded these properties. Opinion and Order, p 8. (He had to get something.)

[29] Which culminated when Plaintiff fired Defendant's brother from the post, for what her own attorney politely called "substance abuse." TR III, 16.

Vegas. TR IV, 17-20.[30] Even so, having set itself against Plaintiff's credibility, the trial court seemed to grant Defendant whatever she testified to, including a supposed caretaker relationship with a man she admitted not having a relationship with. TR IV, 13.[31]

The (Much Improved) Status of Quo

Irritated as it was at Plaintiff, the trial court was apparently willing to let Defendant go on most anything. While no one would expect this Court to unseat a trial court as the preferred judge of credibility, the Defendant's own words earn just a bit of space:

Q. But, you'd certainly say that you have raised your standard of living since Mr. Quinney died?

A. That I have raised my, no I have not.

Q. You have not?

A. No, I have not. TR IV, 36.

While some might be inclined to think the trial court's statements on frugality might be of a continuing nature, a brief examination of the status quo order during the pendency of this case is in required. Defendant complained, loudly and often, that Plaintiff had not paid everything he was required to. In reality, the words "he was required to" in the prior sentence may as well be

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[30] Orville Quinney was out and about, both in Las Vegas and writing his own checks, all through 1993. TR V, 113-114. Defendant's "three years before the caregivers were hired" would have thus lasted sometime past his death, if it were indeed three years of care by her. Unfortunately, the majority opinion below credits Defendant's testimony about the time and amount of her supposed caregiving without regard to how ridiculous it was in light of both Mr. Quinney's condition and the undisputed hatred that ran between Defendant and Mr. Quinney.

[31] According to Defendant, one of the problems was apparently that Mr. Quinney felt "everyone wanted his money." TR IV, 13. While his facilities eventually failed him, Mr. Quinney may well have gotten this one about right.

~~struck out~~, as saying he was required to pay for everything for Defendant would about cover it. Recalling that she was getting $1,000 from the 3204 rental (TR I, 99) and $1,200 from the Johns Road rental (TR I, 100) every month, Plaintiff was also required to pay the house phone, cell phones, electric, propane, health insurance, property taxes, newspapers, magazines, vehicle costs, satellite television costs, internet costs of Defendant, and toss in an extra $1,000 per month just in case that did not cover everything. TR IV, 35, 63. Adding in daughter Christine's pom squad costs of $5,000 per year or so (apparently lots of trips), and the taxes and maintenance on the properties Defendant was receiving rent from, was also required. TR II, 79; TR IV, 47.[32] All of this, however, was not enough to prevent Defendant from demanding reimbursement for the printer cartridges for a computer printer at the house. TR IV, 57.

Even so, Defendant had complaints that she had not been reimbursed for a good many expenses. *E.g.* TR II, 82.[33] Defendant claimed to have paid all of the bills he received, but admitted to having issues with just receiving copies of the fronts of checks supposedly paid by Defendant, rather than bills or copies of the back of the checks, and not always paying in such instances, as he questioned whether they were ever negotiated. TR II, 64-65.[34] It did not help

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[32] Undersigned counsel did not represent Plaintiff when the status quo order was issued, which leaves him with no idea how this cash cow (for Defendant) came to be masquerading as a status quo order.

[33] This is truly just an example. Turning to any random page of Defendant's cross-examination of Plaintiff is likely to reveal some instance where Defendant said Plaintiff did not pay something.

[34] With an answer for everything, Defendant pointed out that she would send the copies of the checks which had at the bottom a printed runner with the amount the bank paid printed on the check. TR IV, 52. While probably too prone to fill his margins with just this sort of trivia, undersigned counsel had never heard of this, and, try as he might on a whole pile of cancelled checks, never did find it. Perhaps it is a practice peculiar to Defendant's bank, and, in any case,

that Defendant used the parties joint checking account[35] to pay the bills before asking for Plaintiff to pay her back, TR III, 5, especially when there was some $15,419.43 in the account when the parties separated. TR III, 152.[36]

The Children

Given that no issues regarding them are raised in this appeal, it suffices to say that Plaintiff had a regrettably not good relationship with his children. Even Plaintiff said that his early relationship with them was good, TR IV, 46, but, thereafter things went downhill. Not surprisingly, he blamed Defendant, *e.g.,* TR III, 30, and she blamed him and his supposed relationship with another women (discussed *infra*). TR IV, 23. Dr. Zipper, a psychologist seen by both Defendant and the younger daughter, Christine, thought that, as to that daughter's problem, "[i]t's hers, neither parent gave her this problem." TR IV, 102.[37]

The Bonds "Mystery"

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is hardly one that Plaintiff could be expected to have been aware of. When any normal person asks for a cancelled check, no doubt, they want to see the endorsement side too.

[35] What money there was going into this account, beyond what was in it when the parties separated, was coming from the rental properties whose rent the status quo order gave to Defendant, TR III, 189, meaning that, in essence, she was asking, and sometimes receiving, a reimbursement of all expenses so that the $2,200 in rent she was receiving each month during the pendency of this action could be simply be discretionary funds.

[36] Hindsight is 20/20. Plaintiff need not have let this bother him, as, while the trial court could not figure out how much was in this account (despite a clear record on this point), TR III, 152; Opinion and Order, p 2, n 2, p 8, it was certain that it would just give it all to Defendant anyway. Opinion and Order, p 8.

[37] While Defendant's treatment with Dr. Zipper had been something of a mystery to Plaintiff, owing, no doubt, to the oh so wide open lines of communication between the two of them, after the doctor's testimony, Plaintiff agreed that therapy for Christine was called for. TR V, p 122.

While Plaintiff took the trial court's blame for physical violence (and everything else) in the marriage (Opinion and Order, p 3), it was he who got hospitalized once. TR I, 149. After a struggle, during which he hit his head, Plaintiff drove away from the Johns Road house, only to black out and crash his truck into a ditch. TR 1, 149. Strapped to a backboard, he went to the hospital, leaving the briefcase with his father's belongings on the truck seat. TR I, 150. The briefcase contained his father's financial instruments and papers (recalling that Plaintiff was his guardian/conservator at the time), including some $40,000 - $50,000 in bearer bonds. TR I, 150-151. They "disappeared," though Plaintiff was quite certain that Defendant, the only person left on the scene once the ambulance drove away, was responsible. TR I, 151. Just prior to commencing the divorce was started, Plaintiff decided to inventory the contents of the marital home. TR II, 4-5. With videotape rolling, he visited the various rooms in the house, and opened the safes. TR II, 5. In one he found some $46,000 in one hundred dollar bills. TR II, 7. While Plaintiff thought that some of that amount could have been squirreled away by Defendant, the denominations and coincidentally similar amount, no doubt, left him suspecting it was the bearer bond money. TR II, 8.[38] When questioned, Defendant ran through a multitude of possible sources for this money. TR III, 165-174. It was $10 per week savings for the kids, babysitting money, the kids' odd job money, her milk maid job money, whatever. *Id.* No doubt, of course, that it was *not* the bond money. Once it came to light, she put it in bank accounts for her daughters. TR III, 170, 195.[39] Not long thereafter, the account of the older daughter, Jeannette,

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[38] Another safe existed, and, apparently, Defendant once, after Plaintiff moved out, reported $10,000 in cash missing from it. TR II, 10-12.

[39] Kids get blamed for everything. At least according to Defendant, the other $10,000 in the other safe was the kids too. TR III, 176.

paid Defendant's attorney, Mr. Literski's, $16,000 (before trial) bill, along with the bills of the mediator and appraiser. TR III, 196-197.[40]

While the obvious ending bores in literature, it is often true in court. Nonetheless, the trial court left this matter with just a note:

> The amount of cash or other valuables floating around the Deyo home is puzzling. Questions raised were not resolved by evidence in the trial, and the puzzle remains. Opinion and Order, p 6, n 3.

Unfortunately, of course, the only thing not resolved was the trial court's mind when it came to making even a single, obvious holding against Defendant.[41]

The Brokerage Accounts

What the Plaintiff did get was the funds in the brokerage accounts. Opinion and Order, p 8. They had a net value of just over $448,000. TR I, 63. This figure was arrived at once the pending margin loans against the account of $330,000 were taken into consideration. TR I, 49, 63. In other words, the accounts totaled $778,000, but had $330,000 in outstanding loans

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[40] While Mr. Literski aggressively litigated this case, shaking down his client's children to pay the overdue bills is probably well beyond him (and, hopefully, most other attorneys). What happened here is obvious, Defendant needed an explanation for this not so mysterious "mystery" money, so she "gave" it to the children. Then she needed to pay her attorney bills, so she took it back, with, of course, no fear of teenage hysterics since it was never the children's to begin with.

[41] Those who have flipped to the end first know that the trial court simply gave all the money in all of the accounts, save what Mr. Literski got, to Defendant. Opinion and Order, p 8. Lest Mr. Literski feel left out, the trial court awarded another $12,000 in attorney fees. Opinion and Order, p 9, which the judgment conveniently made payable directly to Defendant's counsel. Judgment, p 10. All of this was in addition to the $16,000 discussed *supra*, a $2,000 retainer paid by Defendant and a prior $500 payment ordered of Plaintiff. TR IV, 169.

secured by them. TR I, 52.[42] The Defendant had nothing at all to do with this account. TR I, 55.

Kris Angelosanto

According to Defendant and the trial court, Ms. Angelosanto is the proverbial "other woman." TR I, 51; Opinion and Order, p 7.[43] Both Defendant and Ms. Angelosanto stated theirs was a platonic friendship. TR I, 51; TR V, 18. Beyond those two parties, who would hopefully both know, no one testified as to anything certain. Even so, it is fair to say that the circumstances suggested something more.[44] In particular, the trial court found revealing a card from 1993 (not quite a decade before trial) that contained a handwritten note flowery enough Hallmark might want to borrow it. TR V, 56. While this probably made for high theater in the courtroom, the impact is somewhat measured when one realizes that everyone had known Defendant has had this card for the last nine years.[45] TR V, 56. In any event, where the trial court has made its finding, while Plaintiff might well disagree, his counsel is not about to waste pages arguing facts

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[42] The majority of the loans involved paying the estate taxes after Mr. Quinney's death and the purchase of the two Steinacker properties. TR I, 55-57.

[43] This belief, of course, was viewed by Defendant as giving her a license to drive by Ms. Angelosanto's house whenever she could not find Plaintiff. TR V, 95. Ms. Angelosanto, not surprisingly, thought she was being stalked by Defendant. TR V, 33-35, 47-50. While that word is ugly, so is driving by someone's house at all hours, regardless of one's rationale for the actions.

[44] It would be easier, by a good measure, for counsel to say that the two had sex six ways from Sunday, deprive his opposite of what will no doubt be some enjoyable writing, and be done with it, but that is not the testimony offered here.

[45] Which, of course, they all would. Anyone whose wife found such a card, particularly in a marriage such as this one, full of volatile emotions, would very soon have no doubt at all that it had been found. The record, sadly, does not indicate what sort of shape the card was in.

which, even if true, cannot support the judgment.[46]

The Trial Court's Opinion

The Opinion and Order is Attached Exhibit 1. While considerable excerpting of that opinion would be the normal course here, this statement already approaches two-thirds of Plaintiff-Appellant's total offering. Moreover, an excerpt could not accurately capture the flavor of the opinion, which is even more result-oriented than most, and strains mightily to reach its conclusions. Accordingly, interested readers are invited to flip to the end and read ahead for a moment.

That said, while the court made some effort to go through the motions of a *Sparks v Sparks* 440 Mich 141; 485 NW2d 893 (1992) sort of analysis, the essential rationale appears under the heading of *General Principles of Equity*[47], to which a couple of footnotes, not the trial court's, have been added:

> This is a case that cries out for the application of equitable principles. This Court is aware of the *Sparks* admonition that fault in a marriage should not be given disproportionate weight, but

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[46] As someone not there, undersigned counsel has the luxury of speculation. Defendant had the card for nine years. Absent no one telling Plaintiff's counsel about it (and she too obviously knew of it, given her very specific approach on recross, TR V, 61), it would likely have been somewhere between malpractice and unethical to allow Plaintiff to testify as he did unless he was *very* insistent as to the truth, and made *fully* aware of just how bad it would look. Predicting relationships between people makes handicapping horses look easy. Plaintiff and Ms. Angelosanto could have been telling the truth, regardless of what the trial court found. Just as easily, the card, some nine years old, could well have reflected something felt on only one side of the relationship (what reader has not been on both sides of that coin at one time or another?), or, for that matter, a reality perhaps accurate then but now long since dead.

[47] And, of course, Plaintiff could not think of a better spot for the trial court to stick something if it was trying to make it appeal-proof.

when the misconduct comes right into the courtroom, the Court cannot ignore it. Plaintiff husband and his girlfriend took the witness stand and tried to make this Court believe they were only friends - - until they were exposed by a love letter.[48]

One of the saddest courtroom scenes this judge has witnessed in a 20-year judicial career occurred when Mrs. Deyo was ridiculed on the witness stand for attempting to save her marriage by staging a romantic candlelight dinner for her husband. This mean-spirited attempt to humiliate her was a graphic reflection of the plaintiff's contempt for the mother of his children. He was not a believable witness, and did not present a credible case.[49] Opinion and Order, p 7.

The Trial Court's Award

The trial court's award appears in its Table 3 on page 8 of the Opinion and Order, which is reproduced below:

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[48] Taking notes while paying attention to testimony is not the easiest thing, especially when drama abounds. Still, the trial court either somehow missed or ignored that being "exposed" by this love letter (actually a card) was some nine years in the making, and everyone knew it was coming. TR V, 56.

[49] Now and again, particularly as one moves toward the highest rungs of the appellate ladder, efforts at determining the actual author of a passage can be intriguing. There is no such difficulty here, however, as there is little doubt that the trial judge wrote this himself. What was left unsaid, but clearly intended, was the next line, ". . . and since he hates her so much, I am going to give her half of the family farm and stick him with her forever." We like dispassionate jurists for a reason, as emotions make lousy decisions in most every case. Fewer cases prove that better than is seen here, as, while Defendant may be laughing all the way to the bank, she will eventually realize that the opposite is true, she is stuck with Plaintiff as a partner, and the venom on her side of the aisle is no less than what is found on his. While the trial court which created this mess, no doubt, will have to deal with it, neither justice nor judicial efficiency are encouraged when parties are left in a situation where the only foreseeable result is mischief and litigation.

Asset	Asset Value	Pltf. awarded	Def. awarded
11 Mile Road South Lyon, MI	**$708,400.00**	**$399,200.00**	**$399,200.00**
2560 Johns Road South Lyon, MI	**$150,000.00**		**$150,000.00**
3802 Steinacker Howell, MI	**$130,000.00**		**$130,000.00**
3814 Steinacker Howell, MI	**$300,000.00**		**$300,000.00**
Chesterfield St. Warren, MI	**$75,000.00**	**$75,000.00**	
Martin St. Roseville, MI	**$75,000.00**	**$75,000.00**	
Mona Avenue Warren, MI	**$75,000.00**	**$75,000.00**	
Oak[sic] Plank Road Milford, MI	**$867,500.00**	**$867,500.00**	
Inherited securities (net value)	**$448,233.71**		
Raymond James Account -securities	**$79,132.25**		**$79,132.25**
3 Bank One Accounts	**$39,502.00**		**$39,502.00**
Total	**$3,037,767.96**	**$1,939,933.71**	**$1,097,834.25**

Opinion and Order [Attached Exhibit 1], p 8, Table 3.

Accordingly, based on its stated belief that Plaintiff was a "less than ideal" husband (Opinion and Order, p 7) and its unstated but all too obvious belief that he was a lousy human

being, the trial court awarded the Defendant 100% of the marital assets, and then gave her half of Plaintiff's separate inherited family farm, making her an instant millionaire. Plaintiff thereafter claimed his appeal, and, since it was filed within the required 21 days, it actually arrived at this Court before the parties had their first dispute over the Eleven Mile Road property they now co-own. The same, to be sure, cannot be said of this pleading.

Procedural History

Though eight pages of docket sheets would not suggest it, the procedural history of this case is relatively straightforward. Following the usual pretrial depositions and discovery[50], some pretrial skirmishes over a very generous (to Defendant) status quo order, and a failed mediation, the parties went to trial. Nearly a month after the last day of the five day trial (where only the third day, September 3, 2002, had seen a true full day of trial, 8:55 a.m. to 4:48 p.m., TR III, 3, 245), the trial court issued its Opinion and Order, on October 4, 2002.[51] Consistent with this trial court's practice, it included a status conference date if the judgment was not prepared. The conference proved necessary, and was held on November 1, 2002. Thereafter, on November 19, 2002, judgment was entered. Plaintiff-Appellant timely filed his claim of appeal on November 26, 2002.

The Court of Appeals Decision

The Court of Appeals (Bandstra, P.J., Fitzgerald, J.J., and Sawyer, J.J.), heard argument

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[50] "Usual" being applied in the sense of what is normally found in a case with substantial assets where all of the attorneys know they will get paid.

[51] Attached to the trial court's Opinion and Order was a copy of the parties' stipulated order as to arbitration for personal property, which also appears here at the end of Attached Exhibit 1.

on this matter and thereafter issued a split decision, which is Attached Exhibit 3. The majority's view was nothing more, nor less, than the trial court's, as it simply cut and pasted various favored passages of the trial court's findings, along with the usual "testimony supports" sort of language. Slip Op at 2-3.

Judge Sawyer dissented, focusing on two issues. Initially, Judge Sawyer pointed out that, as this Court recognized in *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999), "property received by a married man as an inheritance, but kept separate from marital property, is deemed to be separate property not subject to distribution." The majority's decision offered no counter to this point, nor explanation for its disregard of this Court's precedent.

Secondly, Judge Sawyer noted the fallacy of the majority's, and the trial court's, essential premise, that because Defendant (supposedly, and not really much at all if one actually compares the timelines and testimony instead of just blindly accepting everything she said) cared for Mr. Quinney, she somehow "earned" some share of the inheritance. As Judge Sawyer pointed out, under MCL 700.1101, *et seq,* Mr. Quinney certainly could have, but did not, leave Defendant anything and, furthermore, there is nothing in the record to suggest that Plaintiff (Mr. Quinney's only son) would not have inherited every bit of property regardless of Defendant's actions. Accordingly, Judge Sawyer would have reversed. Dissent, Slip Op at 2.

At no point did the Court of Appeals address Plaintiff's primary concern, the fact that he was bound for life to share the family farm with Defendant, despite supposedly being divorced from her. Accordingly, Plaintiff moved for reconsideration, with this point being the sole focus of his presentation (just as it had also been the sole focus of his reply brief), and the Court of Appeals, Judge Sawyer dissenting, denied same on July 1, 2004. Plaintiff-Appellant now applies

for leave to this Court.

ARGUMENT

Issue I

DID THE TRIAL COURT ERR IN AWARDING 100% OF THE MARITAL PROPERTY, AND, BEYOND THAT, HALF OF THE PLAINTIFF'S INHERITED FAMILY FARM, TO DEFENDANT-APPELLEE, MAKING HER AN UNDIVIDED TENANT IN COMMON ON SAID FARM, AND ALSO AWARDING HER $200.00 PER WEEK IN UNENDING ALIMONY, ALL ON THE BASIS OF ITS DETERMINATION THAT DEFENDANT BORE FAULT IN THE FAILURE OF THE MARRIAGE?

The trial court answered this question: No.
The Court of Appeals answered this question: No.
Defendant-Appellee would answer this question: No.
Plaintiff-Appellant answers this question: Yes.

Standard of Review

In a divorce action, this Court reviews a trial court's factual findings for clear error. *Sparks v Sparks,* 440 Mich 141, 151; 485 NW2d 893 (1992). When the trial court's factual findings are upheld, its dispositional rulings are then reviewed for fairness and equatability in light of those facts. *Welling v Welling*, 233 Mich App 708, 709; 592 NW2d 822 (1999). Such dispositional rulings are discretionary with the trial court and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Sands v Sands,* 442 Mich 30, 34; 497 NW2d 493 (1993); *Draggo v Draggo*, 223 Mich App 415, 429-430; 566 NW2d 642 (1997).

As this Court well knows, in general, trial courts are entrusted with broad discretion to

fashion property distributions in divorce matters which are fair and equitable under all of the circumstances. *Sparks v Sparks,* 440 Mich 141, 151-152; 485 NW2d 893 (1992). That said, however, in certain areas our Legislature has supplanted that discretion with particular rules which limit what can and cannot be done. Included among these areas where the boundaries of discretion are well defined is one issue central to this case, that of separate property. *See, e.g.,* MCL 552.23. Where issues of separate property are involved, rather than unfettered discretion, the Court can only depart from the norm, namely restoring the separate property to the party to whom it belongs, in very limited circumstances. *Reeves v Reeves,* 226 Mich App 490, 497-498; 575 NW2d 1 (1997).

Separating the Questions

There are a few interrelated questions in this case. The first concerns the division of marital property, though the trial court thought nothing of this one at all, simply awarding everything to the Defendant. While the trial court seemed to think that Plaintiff agreed with this, Opinion and Order, p 7, such an absurd suggestion could only result from viewing the case, as the trial court unfortunately did, as a cheerleader on Defendant's sideline, rather than as a referee in the middle of the field. While Plaintiff certainly argued the point that, given the vast assets in the marital estate, there was no reason, at all, to invade his separate property out of necessity, he hardly acquiesced, then or now, to the outrageous view that any amount of fault, much less what was suggested here, could entitle a party to strip their spouse of every last shred of martial property.

Before getting any farther, however, some effort is required to address just what is, and is not, marital property, as, while the trial court never did seem to care to make, as opposed to just

identify, any of the close calls, Opinion and Order, p 5, paragraph 2, the questions cannot be addressed without a firm understanding of where each piece of property lies. Figuring that out, however, requires an analysis not just of the facts, but also the applicable law.

Statutory Concerns

This Court has long made clear the importance of strict fidelity to statutory mandates. Time and again it is held that where the Legislature adopts a policy question as its own, Courts are to strictly apply what is written, rather than succumb to the temptation to tinker towards a particular result. Where an inheritance exists and has been treated as separate property, it may be "distributed as part of the marital estate only if the remaining property [is] insufficient for the suitable support and maintenance of the defendant, MCL 552.23 or if [the opposing spouse] contributed to its acquisition, improvement, or accumulation. MCL 552.401." *Lee v Lee,* 191 Mich App 73, 79; 477 NW2d 429, 432-433 (1991), *citing Charlton v Charlton,* 397 Mich 84; 243 NW2d 261 (1976) and *Grotelueschen v Grotelueschen,* 113 Mich App 395, 399-401; 318 NW2d 227 (1982). This Court's holding in *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999), which Judge Sawyer noted in dissent below, hardly broke new ground, but, rather, simply noted and reinforced a rule the Legislature has long mandated.

Active versus Passive and Separate versus Marital

Perhaps because *Reeves v Reeves*, 226 Mich App 490; 575 NW2d 1 (1997), for so long stood, among published cases, nearly alone on this point, the question of active versus passive appreciation of separate property has often proved a quagmire for trial courts. Indeed, lost in such debates is often the question they were supposed to initially answer, whether the property was separate or marital. As it happens, however, this case deals primarily with real estate, just as

Reeves did, making the analysis much easier.

Statutory Construction

Reeves itself is not some judge-made apportionment, but, rather, a simple tool to assist in the application of MCL 552.401. The rules of statutory construction, of course, require that any question regarding the statute begin with the text of the statute at issue.[52] *In re MCI Telecommunications Complaint,* 460 Mich 396; 596 NW2d 164 (1999). Accordingly, MCL 551.401 reads:

> (1) The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property. . . . MCL 552.401(1).

***Reeves* and its Progeny**

As *Reeves* was written well after MCL 552.401 was enacted, it is hardly surprising that

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[52] This is, of course, but a one of the many well-known mandates surrounding the interpretation of a statute. Among the remainder are the following: "The primary goal of judicial interpretation of statutes is to ascertain and give effect to the Legislature's intent." *Chop v Zielinski*, 244 Mich App 677, 679; 624 NW2d 539 (2001), *citing Frankenmuth Mut Ins Co v Marlette Homes, Inc,* 456 Mich 511, 515; 573 NW2d 611 (1998). It is the precise language of the statute that is controlling. *People v Borchard-Ruhland*, 460 Mich 278; 597 NW2d 1 (1999). Where the plain and ordinary meaning of a statute is clear, judicial construction is neither necessary nor permitted. *Cherry Growers, Inc v Agricultural Marketing & Bargaining Bd,* 240 Mich App 153, 166; 610 NW2d 613 (2000). In such cases, Courts will not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute. *In re Schnell,* 214 Mich App 304, 310; 543 NW2d 11 (1995). The final message of all these, in simple terms, is that the text of a statute means what it says and says what it means. Those who venture beyond the boundaries of the words found in the text to suggest they "really mean" something more or different are destined to run afoul of this Court's constant, and consistent, teachings.

Reeves is entirely consistent with MCL 552.401, and, for that matter, is a useful tool in apply it.[53] Not surprisingly, given the Legislature's entrance into this area, which otherwise would be simply left to the trial court's discretion, *Sparks v Sparks,* 440 Mich 141, 151-152; 485 NW2d 893 (1992), *Reeves* appropriately cited, quoted and applied MCL 552.401. Despite all of this, the trial court left *Reeves* in the dust with one line: "In *Reeves,* the Court of Appeals was dealing with a short term marriage, not the 25-year union in this case." Opinion and Order, p 5. While the trial court thus considered it only a burden, in reality, no question as to separate versus marital property, especially when that property is real property, can be addressed before a simple review of *Reeves*, even before the Court of Appeals' more current renderings are considered, is undertaken.

Probably the most important aspect of *Reeves* was simply stated long before the "active/passive" distinction, for which it is so often quoted, was explored.[54] Three groups of properties existed in *Reeves*, all acquired by the husband prior to marriage. The first was a condominium, which was the marital home. Not surprisingly, the Court held that any appreciation during the marriage was properly to be divided, as, by sharing and maintaining the home, the wife contributed. *Reeves* at 495-496; 575 NW2d at 4.[55] The second properties, which

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[53] It should be noted that *Reeves* was authored by now-Justice Taylor. For many that may say enough to the question of *Reeves'* fidelity to the statutory text. To be sure, Justice Taylor is one of Michigan's most forceful voices for strict construction of and adherence to statutory mandates.

[54] *See, e.g,* Bassett, *et al, Michigan Family Law*, §14.16, Vol II, p 14-26 - 14-27 (ICLE, 1998 and 2002 Supp).

[55] Even this is an important point, as, because the properties were marital, the *appreciation*, during the marriage, was divided. Here the trial court did not divide the appreciation, or even the properties, but just gave them wholly to the Defendant.

have some parallels here, were the rental properties. The Court held that "the increase in value (whether by equity payments or appreciation) that occurred between the beginning and the end of the marriage, *Bone* [*v Bone*, 148 Mich App 834, 838; 385 NW2d 706 (1986)], *supra,* was part of the marital estate." *Reeves* at 496; 575 NW2d at 4.[56]

Only with the last property, a one-sixth interest in a shopping center, did the Court note that, since "[i]t cannot be stated, as was done in *Hanaway* [*v Hanaway,* 208 Mich App 278; 527 NW2d 792 (1995)], *supra* at 294; 527 NW2d 792, that the property "appreciated because of defendant's efforts, facilitated by plaintiff's activities at home." *Reeves* at 496-497; 575 NW2d at 4.[57] What *Reeves* did, finally[58], was give trial courts a tool to figure out when, regarding assets which grew during a marriage, the other party may have been said to have contributed by way of "activities at home," *Hanaway* at 294; 527 NW2d 792, and, for that matter, participation in the

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[56] Again, there is no question that the rentals the wife assisted in, on Steinacker and Johns Road, were indeed marital. Of course, the trial court gave these properties, not just the appreciation, but lock, stock, barrel and fee simple, to the Defendant. If Defendant wants to, for the first time, make an argument that she had something, anything, to do with the Macomb County properties, something she has yet to bother to do, or offer any evidence to support, she might even have an arguable claim to the *appreciation* during the marriage as to these properties. When it is recalled, however, that these properties were inherited shortly before the marriage, it can only be wondered how much appreciation, given their low market value, there could have even been.

[57] Neither Plaintiff nor Defendant currently do anything with the family farms, save for Plaintiff's occasional hunting expeditions on them (which, of course, now face the problem that Defendant owns an undivided fifty percent interest in everything on them, meaning Plaintiff is left to ponder how he might shoot only half of a deer in November). These are, of course, passive developments, as they simply sit and, in the case of the Eleven Mile property, earn money thanks to some tenants toiling with trees and an oil well.

[58] *See,* Bassett, *et al, Michigan Family Law*, §14.16, Vol II, p 14-26 - 14-27 (ICLE, 1998 and 2002 Supp), noting that Michigan Courts had long implied an active passive distinction, *e.g., Hostetler v Hostetler*, 46 Mich App 724; 208 NW2d 596 (1973), but had never formally endorsed such a concept before *Reeves*.

joint venture that is marriage.

The *Reeves* tool looks something like this:

1. The statutory rule: contribution to the acquisition, improvement, or accumulation of property.
2. This can include domestic efforts which free up the opposite party to concentrate on wealth building. *Hanaway*.
3. To figure out if domestic efforts did free up the opposite party, look to see if the wealth was built through any active efforts.
4. If it was, then the presumption will be that they were aided by the joint endeavors and labor, be it at home or in the workforce, of the opposite spouse, and the appreciation arrived at during the marriage can be shared.

This particular articulation of this tool, to be sure, is likely to be found nowhere else. It is offered for only one purpose: to endeavor to fan away some of the smoke and confusion surrounding the application of *Reeves*. That said, it says nothing novel or incorrect, nor anything contrary to the statute.

Contribution/Domestic Efforts

Perhaps because it considered *Reeves* "distinguishable," the trial court did not much care what Defendant had done. The entirety of its findings, if they can be called that, on the point, fit easily here:

> This Court believes that the wife's assistance in caring for the father as well as her continuation in the strained marriage for so many years created a situation whereby she did contribute to the inherited estate. Nevertheless, even if this were not the case, the

> Court believes that there are ample other reasons that she should share in the entire estate. Opinion and Order, p 5.

This Court will, of course, give the trial court *a lot* of the benefit of a lot of doubt on factual findings. Plaintiff will not waste his time arguing it should do otherwise, but must ask a couple of questions. First, did the trial court step out when Defendant's claim of three years of preparing meals for the ill father, who, in reality, she hated (and vice versa) turned out to be a few months on cross-examination? TR IV, 17-20. Second, which is it? Was this a nine year affair which totally destroyed the marriage going back to *before* the father even died? Or was this a marriage that the parties tried to work out for many tough years? On the one hand, the trial court assails Plaintiff for a supposed record of fidelity that might make Wilt Chamberlain blush. On the other, it suggests that the marriage was ongoing (or, perhaps, that Defendant deserves some credit for, after becoming aware of the "affair," dragging things out as long as possible to establish her claim to the pot at the end of the rainbow). The trial court used the word "contribute" but only in the most generic of senses, and failed to back it up with any of the sorts of findings that might suggest it was actually true. Moreover, this is not a situation where Plaintiff needed to be "freed up" to tend to winning the bread. He had left his job to care for his father (and it was a menial one in any event). How, exactly, Defendant contributed to Plaintiff's father's estate coming to him is not stated anywhere in the trial court's opinion, most likely because a record some 816 pages long is still not big enough to include anything supporting that sort of contention.

Activity?

Again, the trial court did not bother with this question. Even so, the answer is apparent

enough. The Steinacker and Johns Road rentals were a lot of work, it seems, and both parties participated. No one talked about the Macomb properties, and, at this point, if Defendant wanted them, she should have.[59] The farms just sat there, and the only things done with the land occurred when the lessees trimmed their trees and pumped their oil.[60]

Appreciation?

The trial court did not bother with this question either, likely because it had simply resolved to give the Defendant all of the marital property. Nonetheless, evidence clearly existed in the record as to what the properties were valued at when they came to Plaintiff, via the estate. The estate's accountant put the real property totals at $1,460,000. TR I, 29. Appraiser Chandler provided the figures for the Eleven Mile Road property, valued at $798,400 by him, and $335,000 at the time of the estate appraisal. TR I, 114-115. For the Old Plank property, Appraiser Chandler put the current value at $867,500, up from an estate appraisal $725,000. TR I, 118-119.[61] Subtracting the two farms from the estate's real property total leaves $400,000,

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[59] Given the amount of fees both paid and awarded to her attorney in this case, and the five days of trial this case occupied (before a trial court that seemed willing to give it whatever time it took), she cannot be heard to complain about a lack of resources or the inability to make whatever case she wanted.

[60] While their were small rental homes on the farms, no one suggested that the value of the farms evolved from these, or was even changed much one way or the other by them (indeed, in Defendant's far-fetched and unsupported development scenario, they would have been in the way and awaiting a bulldozer). Defendant offered nothing to suggest she was involved in these properties, and a "status quo" order that gave her most everything she could have wanted left her totally separate from these properties.

[61] Defendant does not like the estate appraisal numbers, which she thinks were set intentionally low to minimize taxes. Given that the estate paid $1,292,831 in taxes, that hardly seems much the case. Moreover, with a budget of over $30,000 for this case (and that is just what has been *paid*, not billed), she certainly had the means to bring in an expert if she disagreed. Plaintiff called Mr. Chandler, who seemed quite respected by everyone. Plaintiff introduced the

which likely included the 3814 Steinacker and the Macomb properties. Everyone stipulated to those being valued at $300,000 and $225,000 (total, 3 x $75,000) respectively (Opinion and Order, p 8), meaning that $525,000 minus $400,000, even if it took place in a world where Defendant had actually bothered to plead and testify as to the Macomb properties, this case had a $125,000 question, not a multi-million dollar one.

If you don't ask the question, you won't know the answer

MCL 552.401 speaks to contribution "to the acquisition, improvement, or accumulation of the property." It is telling this Court nothing new to say that each statutory word must mean something, and none be redundant. *Reeves* addresses situations where property is acquired, improved, or, as in *Reeves* itself, even just accumulates additional value. None of this is new, at all. But, of course, since the trial court did not care to follow *Reeves*, it felt free to do anything it wanted, and, instead of properly dividing some amount of marital accumulation, it simply handed out entire properties to the Defendant.

McNamara

Since the trial court cared not at all about *Reeves,* no doubt, *McNamara v Horner,* 249 Mich App. 177; 642 NW2d 385 (2002), the case in which the Court of Appeals endeavored to expound on *Reeves,* did not matter to it either. In relevant part, the *McNamara* Court held:

> Further, the evidence indicated that these funds were commingled with funds each party contributed before marriage. Thus, the assets in these "premarital accounts" did not increase in value due to "wholly passive" appreciation *Reeves*, *supra*, but instead by

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estate's tax return via its accountant, whom he called. Defendant called no experts on either point.

additional contributions, as well as appreciation. Thus, due to the parties' commingling of premarital and marital assets, it is not possible to accurately determine the premarital appreciation of these assets. . . Accordingly, the trial court correctly held that the entire appreciation of the retirement funds and TDAs were part of the marital estate." *McNamara*, 249 Mich App at 184-185; 642 NW2d at 390.

No Commingling

In this case, everyone knew which assets were at least partially in the marriage and which were outside of it. The parties' actions regarding the status quo order, which involved the Defendant in (getting money from, but not paying anything for) the Steinacker rental and Johns Road properties, but no others, made clear where the line was. This is true, as well, as to the financial accounts of Plaintiff, which, according to the broker who handled them for both Plaintiff and his father before him, Defendant had nothing at all to do with. TR I, 54-55.[62]

Besides *Reeves*, the *McNamara* Court relied on the inability of the Court to determine which assets where which, and what the "premarital appreciation" was. There is no such problem here. First, the question in *McNamara,* beyond *Reeves*, was what the "premarital appreciation" was. Because of the way the parties contributed, the difficulty the *McNamara* Court experienced was in determining how much *predated* the marriage. That is *not* an issue here. Everything arrived to Plaintiff from his father's estate, neatly organized on IRS form 706. TR I, 26. The parties stipulated to most of the current values, and no one took issue with

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[62] It needs only a note to say that these accounts were passive, not active. The broker, Timothy White, testified, and made it clear that he managed the accounts, with Plaintiff's only involvement being the taking of occasional draws against the margin and his approval of Mr. White's use of maturing securities to subsequently pay the balance down. TR I, 45-56.

Appraiser Chandler as to the rest. This is simple math, without any difficult questions.

There was no question in *McNamara* that the *intra-marital* appreciation would indeed stay within the marriage. The *McNamara* Court had already done all that needs done here, it separated out the basic pre-marital contribution of each party. *McNamara* at 185, n 5; 642 NW2d at 390, n 5. The *McNamara* defendant wanted his premarital interest, which, under *Reeves*, he would have been entitled to, but, because of the commingling, he could not get that. Here there is no such problem, and no such commingling. *McNamara* makes clear that the issue before this Court is simple enough, divide the separate property from the marital property, and give only a share of the appreciation of the active or jointly tended to former to the Defendant. The trial court got most every part of this wrong, for the simplest of reasons, having decided what it thought the facts were, it chose not to care a bit about the law.

Law and Reason

This is neither the most fascinating nor easily followed case this Court will see this month. This is true for a number of reasons, not the least of which is that the efforts in the record focused mostly on issues that do not affect the essential applicable law. It is not really a statutory construction case, though a statute clearly applies, and Defendant would no doubt really appreciate a novel construction of it, nor is it really an "active versus passive" case, as no one has made an issue of this, since the answer is obvious as to each property. It is simply a case where the trial court got things very, very wrong, because it decided the case on just the facts. They matter, to be sure, but the law must be applied to them, not ignored in outrage over them.

Separate Property

With the law now in place, all that remains is figuring out what should have been, but

was not, done in this case: The property gets divided into two piles, marital and separate. The former gets divided while, as to the latter, only the marital accumulation is at issue, and then only if the property was actively or jointly managed.

It is usually the case that most property found in the marital estate is marital property. While such property is defined as property "accumulated through the joint efforts of the parties during the marriage," *Leverich v Leverich*, 340 Mich 133, 137; 64 NW2d 567 (1954), Michigan courts are rather loath, and rightly so, to try to figure out who exactly earned which dime. Marriage is a joint venture, and, thus, most property arriving to it is considered to have been obtained jointly.

That said, however, there are certain types of property which may be found among the parties to a divorce case whose acquisition neither the marriage nor joint efforts had anything to do with. Probably the most common is property owned by one party prior to the marriage, *see, e.g., Reeves, supra* (where real estate equity accumulated prior to the marriage remained with the husband as separate property, despite the arrival of the wife's name to the title documents), but a close second, particularly in longer marriage where the parties, and, thus, many in their families, are older, is that of an inheritance which arrives to one party alone, and is not treated by them as a joint asset. *Van Tine v Van Tine*, 348 Mich 189; 82 NW2d 486 (1957); *Grotelueschen v Grotelueschen,* 113 Mich App 395; 318 NW2d 227 (1982).

This was a relatively long marriage, and, given its duration, it is unsurprising that both parties inherited assets from their now-deceased parents. The testimony in this case indicated that Defendant inherited substantial assets from her mother, in 1988, in two different forms. The first was approximately $100,000 which was placed in a joint Raymond James Financial Services

account. There is no real dispute that these funds were used for marital purposes and, from time to time, replenished in the account with other martial funds.[63] While such actions remove these funds from the domain of separate property, and deposit them squarely into the marriage, there is no doubt that the remaining piece of inheritance Mrs. Deyo received from her mother, namely a coin collection valued at $35,000 upon inheritance[64] in 1988, remained her separate property. The latter the trial court did not trouble itself with in its Opinion and Order, but there is no question it goes to Defendant. The former, however, the Raymond James Account, also went, entirely, to Defendant.

As to Plaintiff, there are more assets inherited, simply because his father spent a good many years successfully accumulating them, and, as an only child, when his father passed, the assets all came to him. One of these, without a doubt, lost a good deal of its characterization as separate property by the husband's own actions. The property at 3814 Steinacker, though

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[63] This account balance, like those of most who actively manage their money, was down a bit by the time of trial, as the evidence at trial indicated that there was $79,132.25 in the account. Nonetheless, there was little question that it had been up and down numerous times, and that funds have gone in and out of this account time and again for all sorts of reasons. Moreover, by now all readers know that the husband was essentially the only one bringing income into this marriage, and, thus, whatever funds went into the account as others floated out clearly came from his efforts, a commingling which suggests to all the world that this asset was a joint asset, because the parties treated it as such. Given that the husband contributed to the "acquisition, improvement, and accumulation" of the property, and namely to the latter two of these, by frequently funneling funds back into the account, this property, despite having begun with a character of separate property, by now has become joint property which is properly to be divided by this Court. MCL 552.401.

[64] Recent times suggest that the more tangible investments are frequently those which are holding, or improving, their value. Absent some casualty there was no testimony of, it is almost certain that the value of this asset has increased, possibly substantially, since 1988. The fact that the husband did not seek to have it appraised merely evidenced his recognition, which is admitted, that the asset was a separate, not marital, one, as, since the day of inheritance, the parties have had no doubt who owns it and done nothing to suggest otherwise.

inherited from his father, became the last marital residence. While there were likely some improvements, each nail need not be undone to see who placed it, as the husband himself (at her quick and continual urging) undertook to place the wife's name on the title to the property. While even this is not definitive under *Reeves*, the fact that it has been used as the marital home strongly suggests what the Plaintiff freely admitted below, that this is probably marital property. That said, however, the very same actions that make this property an asset to be divided strongly distinguish it from several other inherited pieces of realty which were never jointly owned, controlled or improved.

Before addressing those, however, it should be noted that the 3204 Steinacker rental, arriving into the marriage after the death of Plaintiff's father, though purchased with inherited funds, is marital property. As it was next door to the Steinacker marital home, there was obviously some involvement of Defendant in its rental, and thus, it has at least somewhat of a marital character. While it was purchased with Plaintiff's separate funds, that was, simply enough (in retrospect), his mistake, as when he put them into the marriage, he lost the ability to ask for them to be carved back out under *McNamara*.

The passing of Plaintiff's father, less than five years before trial, however, saw a number of other parcels come to him, beyond the Steinacker properties. In particular, the two family farms, one on Old Plank Road in Milford and the other on Eleven Mile Road in South Lyon, had both been in his family essentially all of his life and were indeed his separate property. While Mrs. Deyo clearly salivated over them and targeted them at trial, as they did, obviously enough, have substantial value (though not as much as her pie in the sky development schemes tried to give them), the testimony clearly showed that she is not, was not, and never has been an owner of

them, nor had anything to do with their acquisition, maintenance, or improvement. Indeed, while she, under the status quo order, claimed a hand in the Johns Road and Steinacker rentals, under that same order, she took no part at all in the farms, essentially admitting the obvious, that she had nothing at all to do with them. Moreover, these farms are indeed passive, as, since their arrival into the marriage, no party has done anything at all with them, while the only land being used is that which has been leased to others.

Just as the Plaintiff's long pestered for action in placing the wife on the deed to 3814 Steinacker suggests that the parties agreed to treat that home as marital property, his absence of doing so as to these properties, despite her requests, likewise suggests that the wife had nothing to do with them. These properties came to Mr. Deyo because he was his father's son. Whether he was married to Ms. Deyo, doing the multitude of sundry things the trial court thought he was, or living in a monastery in Tibet, as an only child, these properties were destined to pass to him as both the only heir his father had left to give things to and the only person who would maintain their ownership within the family, a concern never far from the minds of many who have made their living from their own land.

Likewise, the properties on Chesterfield and Mona in Warren, and on Martin in Roseville, exist here only because the Plaintiff's father located them, acquired them, repaired them, rented them, and maintained them throughout the years. That duty has passed to him, and he has likewise done all of this for the years he has had them (and, in fact, even before). Just as the testimony showed that, unlike what occurred with the joint Steinacker residence, the wife is a stranger to the titles on these properties, likewise, there is no indication she managed the properties, collected from the tenants, or unfroze the pipes on these rental properties. She did

nothing of the sort for a simple reason; these were his things, just as they were his father's before him, and she had truly nothing to do with them, both as to their arrival and continued presence. They are neither commingled under *McNamara*, nor, on what the Defendant, with every opportunity in the world, offered as to evidence (nothing at all), active under *Reeves*.[65]

Finally, it must be noted simply for the sake of completeness that there is one truly marital, in every sense of the word, property in this case, the Johns Road property. While the trial court simply gave its favorite answer ("Defendant gets it all") to this property, there is no question that, unlike a good deal of what it did, the trial court at least had the authority to divide this property, even if its judgment and discretion were not really up to the task.

Contribution

There is no question on this record that the wife had nothing to do with the acquisition of the property. The husband, an only child to a father who left no widow, would have inherited this property even if the father had died intestate, and certainly regardless of whether or not, or even to whom, he might have been married. Likewise, the wife, who certainly painted herself in the best of lights with her testimony, did not even bother to suggest she had somehow improved these properties, for the simplest of reasons; she did no such thing. Nor has she done anything to

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[65] Plaintiff paid enough ($12,500) for *Defendant's* lawyers that he would not think them deserving of any break from this Court. Even so, undersigned counsel recognizes that the Court might well think the Macomb properties were active as defined in *Reeves*, given that case's treatment of rental properties, and, thus, intellectual honesty requires recognizing that Defendant could be entitled to some share of the appreciation on these properties from the date of their arrival in the marriage until the parties separated, despite the fact that she made no showing on this issue. Saying this, of course, just leads to the fact that she made no showing on what that appreciation was, either, and, at some point, Plaintiff must simply hope that this Court is less inclined than the trial court to twist facts, jump to conclusions, and ignore law just to satisfy Defendant's unending thirst for property that is not, and never has been (until a certain trial judge came along) hers in any way, shape, or form.

see them accumulate in value (and, for that matter, even if she had, as they were inherited in 1998, there could hardly have been much accumulation, in comparison with their present worth, since that time). While the trial court could, under MCL 552.401, award some portion of separate property to a party who had contributed to it, on this record, there is simply no contribution to be found, and, thus, no award should be had by her. The trial court's half-hearted holding to the contrary, even as it was given, saw added a caveat as to the trial court's real thinking (the "ample other reasons" [read "fault"]), suggesting that it tossed in this holding simply in case someone might dare suggest that there was law to be followed as it set about on its idea of making things right.

Needed for Support?

If one leaves the question of contribution behind, and, since the record did long ago, the Court should as well, under MCL 552.23[66] the question then becomes whether amounts within the joint estate are sufficient for "suitable support and maintenance."[67] To be sure, suitable is in the eye of the beholder, and what is suitable to one person might be luxurious to another. Even so, and even where the frugality of the parties here showed some substantial differences, the *joint*

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[66] The applicable subsection is MCL 552.23(1): "(1) Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody of either party, the court may further award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case."

[67] Plaintiff mentioned this to the trial court in his final brief, which anyone reading might well note undersigned counsel had a bit of a hand in. While the trial court elected to skip over all this in its haste to cry foul and fault, the issue is preserved, and the question was asked of it.

assets in this estate likely exceed the total assets in most of the cases that pass through any given courtroom. There were, as Plaintiff calculated it, just under three-quarters of a million dollars in *joint* assets. Such amounts, to be sure, would likely be "suitable" for most anyone who is not a royal member of the House of Windsor, or, to use the rough Michigan equivalent, the family of Dart.[68] Plaintiff offered the following chart to the trial court:

Asset	**Value**
Johns Road Residence, South Lyon	$150,000 (stipulated)
3814 Steinacker	$300,000 (stipulated)
3802 Steinacker	$130,000 (stipulated)
Bank One Account (as of 3/01)	$15,419.43
Bank One Account (with 2 children)	$15,593.90
Bank One Account (with 2 children)	$24,488.99
Raymond James Account	$79,132.25
Total of Joint Assets	**$714,634.57**[69]

While there was, as mention in the margin, a slight difference in the trial court's figures, there is no doubt that the marital assets in this case, alone, amounted to some $700,000, a figure that puts any question of "need" both in its proper perspective and somewhere long left behind by this case.

Spousal Support

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[68] *See, e.g., Dart v Dart*, 460 Mich 573; 597 NW2d 82 (1999). The trial court cited this case as well, likely, it would seem, to indicate that it had read Plaintiff's trial brief. Sadly, as Judge Sawyer has pointed out, neither the trial court nor the majority cared to abide by its holdings.

[69] The trial court disagreed as to the total in the Bank One accounts, rounding it some $15,000 down to $39,502. Opinion and Order, p 4. Sadly, on the scale of this trial court's errors, a $15,000 fumble does not even make the first round cut.

Permanent spousal support can be appropriate in a marriage of this length. *Johnson v Johnson*, 346 Mich 418; 78 NW2d 216 (1956). Indeed, its arrival is the *least* surprising thing about this award. Why then does it get its own heading and discussion? Simply put, so that everyone can consider just how much "support" Defendant is getting. Two hundred dollars per week is not that much (870.00 per month), but, beyond that, there is $2,200 per month in rental income from the Johns Road and Steinacker houses, half of the $1,000 per month Eleven Mile Road rental house, and half of the oil and nursery leases on that property. Mr. Chandler testified as to the oil lease alone bringing in $300-$900 or more a month. TR I, 115. Thus, at a *minimum*, Defendant gets $3,720 per month, or $44,640 per year. Her last child has grown and is (hopefully) graduating within a week or so of this brief being written. She has an investment and three savings accounts worth over $118,000. Her house is entirely paid for.[70] Still, she gets a yearly income more than the parties made during their marriage in their best year of the 20 some years prior to the death of Plaintiff's father. The trial court commented on the parties frugality, something that neither the Plaintiff nor the status quo situation saw much of from Defendant. Either way, her job for life, on a healthy income beginning at age 44, is now simply to ponder how well she did in the divorce and how glad she is that the judge decided her husband was an awful spouse.

Tenants with nothing in common and joint rights of harassment

The trial court all too clearly insisted that it was awarding the parties an undivided one-

[70] Though she might actually have to start paying some of her own bills.

half interest in the Eleven Mile Road farm. Judgment TR, 17.[71] Accordingly, the parties are now tenants in common, *Sullivan v Sullivan*, 300 Mich 640; 2 NW2d 799 (1942), with all of the usual duties toward one another. *Fick v Fick*, 38 Mich App 226, 228-229; 196 NW2d 18, 19-20 (1972). Removing things from the property, such as timber, without the other tenant's authorization is not permitted, *Clow v Plummer*, 85 Mich 550; 48 NW 795 (1891), and, though the record has not caught up yet, this case could be someday be the one that decides whether *Clow* extends to rabbits, pheasants, deer, etc. That is, of course, the point, both of the trial court and here. While this was partly about money, and giving the Defendant tons of it, this was largely about control.

It is hardly a reach to say that any parties, much less these, who have reached the point of divorce should leave the courthouse fully separated from each other (save for situations involving custody of minor children). Indeed, one of the less difficult holdings of the recent decision in *Olson v Olson*, 256 Mich App 619; 671 NW2d 64 (2003), made this quite clear. Therein, the *Olson* Court[72] quoted this Court in noting that "it would be a rare divorcing couple who would benefit from a judgment that requires them to maintain an ongoing business relationship." *McDougal v McDougal*, 451 Mich 80, 91, n 9; 545 NW2d 357 (1996). Indeed, the *Olson* Court disapproved of a situation where the parties were left as two *minority* shareholders in one's

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[71] Shortly thereafter, the trial court added on a colorful "the Court has done what it's done" [Judgment TR, 17] just in case anyone missed its majestic ability to do whatever it wanted.

[72] Judge Fitzgerald authored *Olson* (and also the Court of Appeals decision this Court affirmed in *Dart*), but signed the majority opinion below. Other than the appreciation for the trial court's experience Judge Fitzgerald clearly expressed at oral argument, which speaks more to personal considerations than the law, Plaintiff has no explanation as to how the holdings in this case and *Olson* might be reconciled.

business. Here, they are exactly equal fifty percent (undivided) shareholders, and destined to be at stalemate on every single issue regarding the property.

It takes not an ounce of imagination, after reading this record, to suggest that the trial court picked the family farm, and made Defendant a tenant in common, both because it knew the parties hated each other and because it wanted to give Defendant some satisfaction and control over Plaintiff.[73] To be sure, arguments and litigation are likely to follow, but, on the other hand, and Plaintiff is *not* hearing it here first, he may as well burn his money as to spend it asking for redress from this particular trial court. Defendant wants this land developed, both to satisfy the most insatiable animal in the world, greed, and to see Plaintiff lose the last vestige of something he cares about. She will, naturally, likely agree to nothing else, and, thus, once the current lease tenants are gone, the future is clear. In another twenty years, this property will likely be sold, and, finally, the parties will be separated. The trial court has guaranteed, not accidentally, that those twenty years will be worse than the first twenty. The caption says this is a divorce case, not a ruling on the value of someone's morals or existence. Sending someone to purgatory should be left to a higher authority than a circuit court judge.

Doing the Math

It is rude, not to mention imprudent, to ask this Court to do work a party will not bother with. Accordingly, Plaintiff must offer his chart as to what should have been done:

Marital Assets

Asset	Asset Value	Description/Action
2560 Johns Road South Lyon, MI	**$150,000.00**	**A true marital home, value divided**

[73] The answer to why this farm, instead of the Old Plank farm, is found in the oil well sitting on it.

3802 Steinacker Howell, MI	**$130,000.00**	**A true marital investment, value divided**
3814 Steinacker Howell, MI	**$300,000.00**	**Purchased by father, separate when inherited, but Plaintiff put wife's name on deed and parties shared it. Appreciation would always get divided, the property itself is a closer call but likely gets divided on these facts**
Raymond James Account	**$79,132.55**	**Wife's account, commingled with marital funds, *McNamara* says it is a toss up and gets split, though compared to everything else, not a priority for Plaintiff**
3 Bank One Accounts	**$39,502.00**	**Accounts with marital money and probably the bearer bonds funds. Plaintiff not disputing valuation, is disputing allocation, as their should have been either a division, but this error is a could zeros behind the trial court's main failures.**
	Wife's Separate Assets	
Coin Collection	**$35,000.00**	**Separate and hers.**
	Husband's Separate Assets	
Chesterfield St. Warren, MI	**$75,000.00**	**Wife had nothing to do with, but, under *Reeves*, she could be entitled to a share of the minimal (1998 [date of inheritance] to separation appreciation.)**
Martin St. Roseville, MI	**$75,000.00**	**Wife had nothing to do with, but, under *Reeves*, she could be entitled to a share of the minimal (1998 [date of inheritance] to separation appreciation.)**
Mona Avenue Warren, MI	**$75,000.00**	**Wife had nothing to do with, but, under *Reeves*, she could be entitled to a share of the minimal (1998 [date of inheritance] to separation**

		appreciation.)
11 Mile Road South Lyon, MI	**$708,400.00**	**Separate, passive, wife had nothing to do with. No statutory basis to invade.**
Old Plank Road Milford, MI	**$867,500.00**	**Separate, passive, wife had nothing to do with. No statutory basis to invade.**
Inherited securities (net value)	**$448,233.71**	**Separate, passive, wife had nothing to do with. No statutory basis to invade.**

Eventually, Enough must be Enough

Traditionally, courts first look to whether half of the marital property is sufficient for one spouse's support. *See, e.g., Davey v Davey,* 106 Mich App 579; 308 NW2d 468 (1981). Even though he would raise an eye at the wife's spending habits, the husband did actually invite the trial court to consider, if it insisted, whether *more* than half of the joint assets would have been sufficient for the wife's support. Though he mightily disagreed, the trial court, evidencing neither a poker face nor much discretion, had made its feelings toward him all too clear, and he expected it to find that the fault to lie with him. While such a finding might allow a trial court to depart from the rule of "roughly congruent" division, *Jansen v Jansen,* 205 Mich App 169; 517 NW2d 275 (1994), and give the wife more than half of the joint property, this is hardly a modern or preferred approach. Indeed, both of Michigan's family law commentators have suggested that the trend of recent caselaw is to restrict, rather than expand, the role of fault-based arguments in property division. "As a practical matter though, courts very rarely apportion a marital division disproportionately due to fault." Victor, *Family Law and Practice,* §20:116, Vol III, p 20-93 (West, 1997 and 2001 Supp). *See, also,* Bassett, *et al, Michigan Family Law*, §14.16, Vol II, p

14-67 - 14-68 (ICLE, 1998 and 2002 Supp).[74] Moreover, giving disproportionate, much less total, weight to this factor is not permitted. *Sparks; Vance v Vance*, 159 Mich App 381; 406 NW2d 497 (1987).[75] Somewhere, in that range between half of the joint property and $700,000 must have been a number "suitable" for the support of the wife, without the need to divvy up the properties which the husband and his father had toiled on and built up over the decades.

Moreover, at least to hear the wife tell it, she is entitled to some amount of spousal support, and, despite her being healthy and able-bodied, with nothing more than a strong aversion thereto preventing her from working, the trial court happily complied. When then is enough suitable enough? Would not $700,000 (or, more appropriately, something a good deal less) *and* a weekly support figure be enough to, as the statute puts it, insure the "suitable support and maintenance" of the wife? No, this trial court apparently said, it's only fair that she gets to live the good life now.[76] According to it, "suitable support and maintenance" includes dividing up

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[74] Bassett suggests that this is true because "as a practical matter, many judges and referees are loathe to embark on the moral judgments and the intrusive and time-consuming inquiries that go along with the question of fault." Bassett at 14-68. Here, of course, far from loathe, the trial judge was actually all too enthusiastic. Bassett, as usual, is probably right, many, and likely most, judges are very hesitant in this field. A particular jurist's own humility, and, thus, awareness of their own fallibility (something no trial court wants to admit and an unfortunate few just refuse to), probably plays a role in how true this is for any given judge.

[75] While the trial court claimed to recall *Sparks* admonition against relying to heavily on fault (Opinion and Order, p 7), that case disapproved of a 75-25 split. *Id.* at 160; 485 NW2d at 902. Here the split is closer to 100-0, and then goes into the negative numbers to hack out some of Plaintiff's truly separate properties. *Sparks* required a number of factors be analyzed. This trial court mentioned each one. That said, however, it relied on only one, and appellate Courts generally do not, and should not, bless an ill-grounded holding simply because it said all of the "magic words." *See, e.g., People v Crawford*, 458 Mich 376, 387-388; 582 NW2d 785, 791 (1998).

[76] Though having Plaintiff pay all of her bills during the pendency of this case, while she took in rents on properties he maintained and paid taxes on could not have been all that bad.

separate assets just to make sure she gets a nice sized share of a pie she has claimed to be as big as the whole kitchen. The role of the trial court, by caselaw, is to equitably divide *marital* property. By statute, however, that role does not intrude on separate inherited property absent a need, for "suitable support and maintenance," beyond the marital assets. There was more than enough for that within the joint assets. Enough is enough, and the wife would have had that and more from the just joint assets.

Fault and Error

Neither our state's laws nor the testimony in this case gave the trial court any call to add to Defendant's take with any of the separate inherited property of Plaintiff. Forgetting that punishment is something it does on its criminal, not its family, docket, the trial court gave her all of the marital property and a good deal of the separate property to. It made her a millionaire, gave her $200 per week in unending support (on top of a boatload of cash and the incomes from 2 ½ rental properties and half of the oil and nursery leases), gave her a permanent interest in, and thus ability to stalemate and frustrate anything involving, Plaintiff's family farm, and guaranteed that she need not work a day in life, and can retire at the ripe age of 44, because, of course, Plaintiff was a lousy husband and deserves all this and more, damn him. That's what this case is all about, who's wrong, and it was Him, period, exclamation point, and with a capital H.

That *is* what this case has been all about, but, no, actually, it cannot be just that. Both marriages and the people in them are not defined just by how they ended. Our laws our broader, and fairer, than that, and we expect our judges to be bigger than that too, and rightly so. While we do not much tolerate parties who lose their tempers in cases, at least they have an excuse. A trial judge does not, even when he disguises it artfully enough that, on first glance, it might look

like just another property division. Enough is enough, and it was passed right on by very early in the last paragraph, and very early in this judgment. Ken Deyo knows exactly what Judge Stanley Latreille thinks of him. He is still waiting to see Michigan law applied to his case.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellant, **KENNETH R. DEYO**, respectfully requests that this Honorable Court reverse the May 25, 2004 decision of the Court of Appeals and the November 19, 2002, Judgment of Divorce of the Livingston Circuit Court and grant him such other relief as is consistent with equity and good conscience.

Respectfully Submitted:

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